



BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF THE APPLICATION
OF THE ARIZONA ELECTRIC DIVISION
OF CITIZENS COMMUNICATIONS
COMPANY TO CHANGE THE CURRENT
PURCHASED POWER AND FUEL
ADJUSTMENT CLAUSE RATE, TO
ESTABLISH A NEW PURCHASED POWER
AND FUEL ADJUSTMENT CLAUSE BANK,
AND TO REQUEST APPROVED
GUIDELINES FOR THE RECOVERY OF
COSTS INCURRED IN CONNECTION
WITH ENERGY RISK MANAGEMENT
INITIATIVES.

Docket No. E-01032C-00-0751

**MOHAVE COUNTY AND SANTA
CRUZ COUNTY'S OBJECTION
TO NOTICE OF APPEARANCE
OF SUBSTITUTE COUNSEL**

Mohave County and Santa Cruz County (the "Counties") through undersigned
counsel, hereby file their Objection to Citizens Communications Company's ("Citizens")
Notice of Appearance of Substitute Counsel, as follows:

I. INTRODUCTION.

This proceeding is remarkable in that it has exposed a persistent pattern of
imprudence on behalf of Citizens Communications Company ("Citizens"). The Counties
have already cited, in prior pleadings, a series of imprudent decisions including (a)
Citizens' failure to resolve the purchase power dispute with Arizona Public Service
("APS"); (b) the waiver of the Gallagher & Kennedy conflict of interest; and (c) the waiver
of the attorney-client privilege.

1 The Commission, in light of its concern over Gallagher & Kennedy's relationships
2 with Citizens and APS ordered Citizens to retain new counsel to represent it in this
3 proceeding. Procedural Order dated April 18, 2002 at 11-12. In response, Citizens has
4 selected the law firm of Brown & Bain. However, Brown & Bain's representation of
5 Citizens creates a new set of problems.

6 **II. BROWN & BAIN IS A WITNESS IN THIS PROCEEDING.**

7 Citizens has identified Brown & Bain as one of the firms that provided it with legal
8 counsel and advice in connection with the purchase power dispute with APS. See, e.g.,
9 Citizens' Brief Re Magruder Motion to Recuse at 3 ("In its contractual disputes or
10 negotiations with PWC or APS, Citizens has used separate counsel including Troutman
11 Sanders, Wright & Talisman and Brown & Bain"); Reporter's Transcript of Proceedings
12 dated April 1, 2002 at 31 ("I'm not quite sure—all of that advice coming from Wright &
13 Talisman and from Brown & Bain, none of that advice coming from Gallagher &
14 Kennedy"). Also, documents that Citizens has provided in response to discovery requests
15 have been authored by Mr. Joseph E. Mais, an attorney with Brown & Bain. These
16 documents are no longer privileged (since Citizens waived the attorney-client privilege)
17 and are subject to examination in this matter. Indeed, Mr. Mais and any other Brown &
18 Bain attorney who communicated with Citizens or otherwise provided advice regarding the
19 purchase power dispute, are potential witnesses in this proceeding. If this case proceeds to
20 hearing, the Counties will examine Citizens' witnesses (including Messrs. Breen,
21 Dabelstein and Flynn) regarding Mr. Mais' letters and communications. Further, the
22 Counties reserve their right to call Mr. Mais and Mr. Brian Lake as witnesses.
23
24

1 The Counties anticipate that other parties to this proceeding, such as Staff and
2 RUCO, who have demonstrated an interest in the imprudence of Citizens' failure to
3 resolve the purchase power dispute will also refer to Mr. Mais' statements and documents
4 in the examination of Citizens' witnesses. Thus, in a very real sense, Mr. Mais is already a
5 witness in this proceeding and his role as such is likely to expand. Notwithstanding Mr.
6 Mais' involvement as a witness, Citizens retained Mr. Mais and Brown & Bain. In fact,
7 the Notice of Appearance of Substitute Counsel is signed by Mr. Mais.

8
9 **III. A LAWYER SHOULD NOT BE AN ADVOCATE AND WITNESS IN THE SAME CASE.**

10 Ariz. Rules of Supreme Court Rule 42 (ER 3.7) provides:

11 (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a
12 necessary witness except where:

- 13 (1) the testimony relates to an uncontested issue;
14 (2) the testimony relates to the nature and value of legal services rendered in
15 the case; or
16 (3) disqualification of the lawyer would work substantial hardship on the
17 client.

18 (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's
19 firm is likely to be called as a witness unless precluded from doing so by ER 1.7 or
20 ER 1.9.

21 Comments to this ethical rule explain in more detail the problem with Brown &
22 Bain's dual role:

23 A witness is required to testify on the basis of personal knowledge, while an
24 advocate is expected to explain and comment on the evidence given by
others. It may not be clear whether a statement by an advocate-witness
should be taken as proof or as an analysis of the proof.

1 In Cottonwood Estates, Inc. v. Paradise Builders, Inc., 128 Ariz. 99, 624 P.2d 296
2 (1981), the Arizona Supreme Court denied Cottonwood's special action and upheld the
3 trial court's decision to disqualify attorney Michael L. Rubin from representing
4 Cottonwood in a breach of contract action and garnishment proceedings where Rubin was
5 to be called as a witness by Paradise. Rubin, at one time, had served as an officer of
6 Cottonwood, had personal knowledge of Cottonwood's assets and liabilities and had
7 transferred assets that were in issue. In its decision, the Arizona Supreme Court made the
8 following statements that are applicable to this case:

9
10 The attorney may be disqualified not because his testimony is incompetent,
11 but because of the dangers and prejudice inherent in the practice. (Id. at 128
12 Ariz. 102, 624 P.2d 299)

13
14 The attorney who testifies diminishes his effectiveness as advocate as well as
15 his effectiveness as a witness. (Id.)

16
17 When an attorney persists in acting both as witness and advocate, ordinary
18 procedural safeguards designed to give the parties a full and fair hearing
19 become problematic. (Id. at 128 Ariz. 103, 624 P.2d at 300)

20
21 Our belief is that an adversary system works best when the roles of the
22 judge, attorneys, and of the witnesses are clearly defined. Any mixing of
23 those roles inevitably diminishes the effectiveness of the entire system. (Id.)

24
The practice not only raises the appearance of impropriety, [cites omitted]
but also disrupts the normal balance of judicial machinery. (Id.) See also,
Sellers v. Superior Court, 154 Ariz. 281, 288, 742 P.2d 292, 299 (App.
1987).¹

¹ In Sellers, the Court favorably cited the Cottonwood case and acknowledged that it had
been decided prior to the adoption of the current Rules of Professional Conduct. See Sellers, at
154 Ariz. 289; 742 P.2d 300.

1 In Security General Life Ins. Co. v. Superior Court, 149 Ariz. 332, 718 P.2d 985
2 (1986) the Arizona Supreme Court further indicated that the party seeking to disqualify an
3 attorney who is a witness must show that (a) the testimony is relevant and material; and (b)
4 the testimony is unobtainable elsewhere. Id. at 149 Ariz. 335; 718 P.2d 989.

5 Citizens' imprudence in not resolving the purchase power dispute is a material issue
6 in this case. In fact, Citizens waived the attorney-client privilege so that its attorneys could
7 testify on this issue. Citizens produced documents authored by its attorneys, including
8 Brown & Bain on this issue. And, Citizens filed the rebuttal testimony of Mr. Paul Flynn,
9 one of its attorneys, regarding the purchase power dispute. The Counties have determined
10 that Brown & Bain's opinions are an integral part of their examination of Citizens'
11 witnesses regarding the decision not to resolve the purchase power dispute.

12 Brown & Bain attorneys are the only ones who can provide underlying
13 information regarding the assumptions they made, the analysis they undertook and the
14 advice that they rendered. Accordingly, the Security General Life requirements are met
15 in this case.

16
17 **IV. CITIZENS SELECTED BROWN & BAIN EVEN THOUGH THE RECORD**
18 **IS CLEAR THAT LEGAL ADVICE IN CONNECTION WITH THE**
19 **PURCHASE POWER DISPUTE IS AT ISSUE IN THIS CASE.**

20 The Counties' objection should not come as a surprise to Citizens. The Counties,
21 in their Motion for Findings of Fact, or in the Alternative, Stay of Proceedings,
22 specifically identified Brown & Bain as one of the firms that, having provided legal
23 counsel to Citizens, would be the subject of examination without the attorney-client
24 privilege. See Motion for Findings of Fact, or in the Alternative, Stay of Proceedings at

5-6. ("Citizens has produced...documents that originally claimed were privileged communications and work-product by the law firms of Wright & Talisman and Brown & Bain. In order for the parties and Commission to properly examine Mr. Flynn (and other Citizens witnesses who had knowledge of, or participated in, discussions with the attorneys), communications and documents once claimed by Citizens to be privileged will need to be explored on the record."). Notwithstanding Brown & Bain's role in the purchase power dispute, the waiver of the attorney-client privilege and the Commission's concerns regarding the appearance of any conflicts of interest, Citizens selected Brown & Bain.

V. REPRESENTATION BY ANOTHER BROWN & BAIN ATTORNEY IS NOT PERMISSIBLE IN THIS CASE.

ER 3.7 (b) suggests that in limited circumstances one attorney from a law firm may represent the client while another attorney from the same law firm is a witness. The narrow circumstance in which this is permissible is when the representation would not result in a conflict of interest or compromise the interests of a former client. However, the Counties will be using Brown & Bain's opinions and statements to impeach Citizens' witnesses. If the Counties are successful, this will cause an unacceptable dilemma for Brown & Bain's lawyers. Indeed, the Brown & Bain lawyer representing Citizens would likely have to choose between supporting his client's position or that of his partner. Moreover, pursuant to the Commission's prior ruling on the Magruder Motion to Recuse, regarding the need to protect the integrity and appearance of propriety of this proceeding,

1 Brown & Bain should not even be placed in this conflict position.² In short, Mr. Mais
2 and Brown & Bain should not represent Citizens in this proceeding.

3 **VI. THE COUNTIES' OBJECTION WILL NOT CAUSE SUBSTANTIAL**
4 **HARDSHIP ON CITIZENS.**

5 The Counties regret that Citizens has imposed this unfortunate situation upon the
6 parties. The Counties are mindful that opposing counsel should not be named as witnesses
7 "as a tactical contrivance to trigger disqualification." Sellers at 299. The Commission will
8 recall that the Counties did not object to the continued representation of Citizens by
9 Gallagher & Kennedy because the law firm had complied with the waiver of conflict of
10 interest provisions of the Arizona Rules of the Supreme Court. But this situation is
11 different.

12 The fact is that Brown & Bain attorneys are witnesses in this case. And, the
13 statements and documents of those attorneys will be a matter of public record, available to
14 be used against Citizens in subsequent proceedings. Thus, Citizens' selection of Brown &
15 Bain has not resolved Citizens' problems but has merely shifted the focus to the
16 impermissible dual role of legal counsel as advocate and witness.

17
18 Requiring Citizens to select new counsel at this point in time will not cause a
19 substantial hardship on the utility. There are no deadlines currently in place in this
20 proceeding and no hearing date has been set. Once Citizens has selected counsel that is

21
22 ² TEP recognizes that substantial legal analysis regarding the disqualification of attorneys
23 for appearance of impropriety and conflicts of interest has been presented to the Commission in
24 connection with the Magruder Motion to Recuse. Rather than restate those arguments, the
Counties refer to and incorporate herein the pleadings filed in connection with the Magruder
Motion to Recuse.

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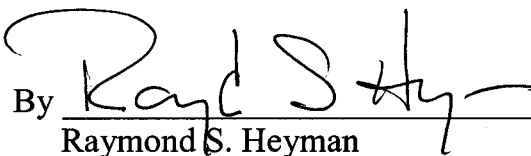
1 not objectionable, a new procedural schedule can be issued.

2 **VII. CONCLUSION.**

3 Wherefore, for all of the foregoing reasons, the Counties request that the
4 Commission disqualify Brown & Bain from representing Citizens in this proceeding and
5 order Citizens to provide notice of appearance of substitute counsel that is able to represent
6 it in this proceeding.

7
8 RESPECTFULLY SUBMITTED this 9th day of May 2002.

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